Reference No.: B-9
Updated: 3/24/02

Parental Rights and Opt-Out Policies:
Trends in Case Law

While it would be inappropriate for The Rutherford Institute to provide you with specific legal advice under these circumstances, the Institute is pleased to provide you with the following information regarding your area of concern.

This brief discusses several published court decisions which affect the right of parents to obtain or withhold permission for his or her child's participation based on the content of the curriculum.

Overview

Several decisions by the Supreme Court of the United States since the 1920's expressly recognize a right to privacy under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and that based on that right to privacy, a parent has the fundamental right to instruct and direct the upbringing of his or her child. This parental right, however, generally does not include the right to determine a child's public school curriculum. In addition, although parents do not have the right to choose that their children opt out of a program, particularly if their objection is purely secular, the Supreme Court has recognized that such a specific right exists when the general parental right to direct the upbringing of a child has been asserted along with another constitutional right such as the free exercise of religion. Nevertheless, the recent trend among the courts has been to refrain from fully recognizing a parental right to control what their children may hear and learn in public schools.

Parental Rights: Liberty Interest, Human Right, and Privacy Right

Almost eighty years ago, in *Meyer v. Nebraska*,[1] the Supreme Court expanded the constitutional concept of Aliberty@ in the Fourteenth Amendment of the U.S. Constitution to include a parent=s right to direct and control the Achild rearing and education@ of their children.[2] Under *Pierce v. Society of Sisters*,[3] decided two years after *Meyer*, the Supreme Court determined that the Compulsory Education Act of 1922 interfered with the liberty of parents and guardians to direct the upbringing and education of their children by conflicting with the rights of parents to choose their children's schooling. In *Smith v. Organization of Foster Families*,[4] the Court also noted that this Aliberty interest@ arises out of those rights that are considered intrinsic human rights and that this liberty interest of family matters has been considered an intrinsic human right throughout the country=s history and tradition.

The Supreme Court has also held that a person's right to direct his or her child=s education is a fundamental aspect of a person=s right to privacy over family matters. For example, in *Paul v. Davis*,[5] the Court described familial relationships as falling into a Azone of privacy@ creating rights that cannot be infringed upon.[6] In *Santosky v. Kramer*,[7] the Supreme Court ruled that the right to make one=s own choices concerning family matters is a fundamental liberty interest protected by the

Fourteenth Amendment of the U.S. Constitution.

Ironically, the Court's finding of a right of privacy in the Fourteenth Amendment has also formed the basis of its pro-abortion decisions. In *Planned Parenthood v. Casey*,[8] for example, the Court reaffirmed the concept of privacy in family matters and included within this right of privacy the woman's right to choose an abortion. This may explain why in recent years, the Supreme Court has remained suspiciously silent in revisiting the right of privacy as it pertains to parents. While this is merely conjecture, it is possible that if the Court now regrets its basing of parental rights on a constitutional right of privacy, then it is reluctant to openly declare this for fear that it would remove the underpinning of its many decisions recognizing abortion as a privacy right. In the meantime, it has been many years since the Court has vigorously defended the right of privacy in a parental rights case.

Parental Rights and Free Exercise

Wisconsin v. Yoder,[9] the 1972 Supreme Court decision dealing with Amish parents' refusal to enroll their children in certain grades of public school, further established the role of parents to participate actively and direct the course of their children=s education. In that case, the Court recognized that the combination of the parental right to conduct one=s child=s education and the fundamental right to exercise one=s religion freely outweighed the government's interest in compelling a child to attend a public school.[10] The Court established that when such a coupling of fundamental rights occurs, the government must overcome the most difficult standard for justifying its law or policy (i.e., the state must show a "compelling interest.") [11]

Excusal

Earlier in the century, several state and federal courts recognized the right of parents to request that their children be excused from a particular class or method of teaching.[12] For instance, in *Vollmar v. Stanley*,[13] a Colorado court concluded that parents can refuse to have their children taught what they think is harmful, except for what must be taught for Agood citizenship@. In *Hardwick v. Board of School Trustees*,[14] a California court held that parents do have the right to control their children and this includes teaching their children to live by their teachings and principles taught in their home that they think will best serve their children=s welfare. The court stated that to deny parents this right is to deny to parents the right to Agovern or control, within the scope of just parental authority their own progeny.@[15]

Since *Wisconsin v. Yoder*, however, the Supreme Court has been reluctant to address parental rights claims and most courts confronted with such claims have been reluctant to recognize a parental right to control what children are taught in public schools. For example, in *Davis v. Page*,[16] a case occurring during the mid 1970's, members of the Apostolic Lutheran faith objected to the Amode and manner in which the educational process is conducted@ in a New Hampshire school district.[17] Specifically, the families objected to the humanist approach to education and the increased prevalence of Asexually oriented teaching programs,@ the open discussion of personal and family matters, and the receipt of advice of secular guidance counselors (these objections included the use of all audio-visual equipment).[18] For a period of time, students who objected to any classroom activities based on religious objections were allowed to leave the classroom. Because of the number of students who asked to leave the room and the discipline problems that arose, the school

discontinued this practice. Parents of one of one of the children sued the school district. The federal district court ruled in favor of the school district, reasoning that the parents failed to demonstrate that they were preparing their children for life in an Aisolated, independent community@ as was demonstrated by the Amish families in the Supreme Court's *Yoder* decision (discussed above).[19]

Additionally, the court also held that because what these parents found objectionable was pervasive throughout the educational program of the school district, it would be impractical to ask the school district to change this to accommodate these families; to allow students to be exempted from an objectionable class would frustrate the school's educational mission to such a large degree that it would no longer be able to teach these children.[20]

In a more recent adverse outcome for parents, the U.S. Court of Appeals for the First Circuit in *Brown v. Hot, Sexy, and Safer Productions, Inc.*[21] officially acknowledged the right of parents to direct the upbringing of their child, but stated that this right did not extend to telling a school district what it may or may not teach.[22] This case involved a sexually explicit lecture in the assembly hall by a self-proclaimed sex expert and MTV comedienne, who used profanity and requested volunteers from the young audience to participate in sexually symbolic acts which many found vulgar, inappropriate and violative of the children=s free speech rights. The First Circuit, however, ruled: "[T]he state does not have the power to 'standardize its children' or 'foster a homogenous people' by completely foreclosing the opportunity of individuals and groups to choose a different path of education. . . . We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen their children."[23]

The court found that parents have no right to inform the state, "You can't teach my child subjects that are morally offensive to me."[24] The parents, of course, were actually most distressed by the fact that the school did not give them any fair warning of the type of presentation that their children were attending and provide them with the opportunity to opt their children out of the presentation. Unfortunately, the *Brown* court apparently saw no difference between parents who try to tell a school what to teach and parents who seek to excuse their children from offensive coursework.[25]

In *Herndon v. Chapel Hill-Carrboro City Board of Education*,[26] a North Carolina court refused to invalidate a mandatory community service program on the parental right to direct the education of one=s children.[27] The court determined that, notwithstanding Supreme Court precedent, the Aright of individual parents to exert pre-emptive control over the curriculum of public schools is not a >fundamental= one subject to >strict scrutiny=.@[28] The court then determined that the board of education was able to substantiate that its community service program bore a rational relationship to its educational objective and therefore was not unconstitutionally arbitrary.[29]

In a very similar case, *Immediato By Immediato v. Rye Neck School Dist.*,[30] parents in New York brought a challenge to a mandatory community service program. This court ruled that there is Ano federal case law which recognizes a constitutionally protected parental right for students to opt out of an educational curriculum for purely secular reasons.@[31] This court also ruled that schools have a legitimate interest in educating students in the manner they deem best and that it is a poor public policy decision to allow parents to take their children out of this education program on purely secular grounds.[32]

In one recent case, parents asserting both parental rights and free religious exercise rights achieved limited success. In *Ware v. Valley Stream High School Dist.*,[33] the high court in New York ruled that a trial court had erred in granting the school district=s motion for summary judgment (i.e., judgment without the necessity of trial) against parents who challenged an AIDS education program based on religious objections.[34] These students desired to opt out of the entire education program but the school district would only allow them to opt out of a portion of the program.[35] The program was based on a state law requiring all students to be educated about AIDS but allowing an opt-out provision for the portion of the program addressing prevention if a student=s legal guardian(s) requested this.[36] Plaintiffs, however, requested to have their child excused from the entire AIDS program.[37]

The court ruled against a dismissal of the parents' case, stating that they would win at the trial level if they could show that: first, the school's goal of educating and preventing AIDS among schoolchildren would not be seriously undermined since the nature of the plaintiffs' religion would make the teaching of such information completely irrelevant and unnecessary for their children (because of their strong religious convictions against all of the causes of AIDS); second, the public school's AIDS curriculum would pose a threat to the continued existence of plaintiffs' Brethren church community.[38] Here, unlike the cases dealing with community service programs, the court recognized the fundamental interest of the parents' free exercise of religion. At the same time, the New York court's decision established a very high standard for parents to meet, particularly when it required the parents to establish that the school program poses a threat to the continued existence of his or her entire church community.

Meanwhile, an intermediate level court in New York ruled in *Alfonso v. Fernandez*,[39] ruled that a condom availability program was violative of parental rights to rear their children.[40] The court found that parents were being compelled, through compulsory education requirements, to send their children into an environment where they will be Apermitted, [and] even encouraged, to obtain a contraceptive device, which the parents disfavor as a matter of private belief ... [s]tudents are not just exposed to talk or literature on the subject of sexual behavior; the school offers the means for students to engage in sexual activity at a lower risk of pregnancy and contracting sexually transmitted diseases.@[41] They also found that the policy was not Aessential@ and that Aby excluding parental involvement, the condom availability component of the program impermissibly trespasses on the petitioners= parental rights by substituting the respondents in loco parentis, without a compelling necessity.@[42]

Yet this was also a limited victory because the court in *Alfonso* found that the program did not violate the parents= free exercise claim.[43] In so ruling, the court specifically determined that the threat that students may succumb to peer pressure does not rise to the level of a constitutional violation against religion.[44]

In an adverse 1995 decision, the Massachusetts Supreme Court in *Curtis v. Falmouth*[45] decided that a condom distribution program did not violate the constitutional rights of parents.[46] While the program did not provide for an opt-out provision, the court ruled that parents= rights were not violated because participation in the program was not mandatory.[47] Specifically, the court found that students were not required to Aseek out and accept the condoms, read the literature accompanying them, or participate in counseling regarding their use.@[48] It also noted that students are free to decline condoms with no penalty, parents may still instruct their children not to make use

of them, and the school in no way seeks to advise children on moral or religious issues.[49] The court argued that mere exposure to school programs that offend Athe moral and religious sensibilities@ of individuals does not rise to the level of a constitutional violation.[50] It is important to note that, in this case, the parents did assert a free exercise claim, yet the court still held that the parents had not met their burden of proving that the program violated their fundamental rights.

More recently, the Third Circuit faced a similar factual scenario in *Parents United for Better Schools, Inc. v. School Dist. of Philadelphia*[51]. In that case, two parents sued the school board for distributing condoms to students, claiming that the high school condom distribution program violated their Fourteenth Amendment right to bring up their children without unnecessary governmental interference. As with Curtis, the court sided with the school board because the condom distribution program did not demand student participation, and gave parents the option to exclude their children from receiving condoms.[52]

Finally, in a less controversial opt-out topic - school uniform policies - the Fifth Circuit held that the district=s uniform policy did not entangle parents= fundamental due process rights in the upbringing and education of their children, and in fact was justified by a rational basis.[53] Furthermore, the policy=s opt-out procedure, which required parents with bona fide religious objections to apply for exemption by filling out a questionnaire designed to measure the sincerity of their beliefs, did not violated First Amendment free exercise and establishment clauses.[54]

For a more detailed analysis of the *Ware*, *Alfonso* and *Curtis* decisions, please request Freedom Resource #B-12, entitled Parental Consent for AIDS/HIV Education in Public Schools.

Conclusion

Although the Supreme Court has stated a right of parents to control the education and upbringing of their children, more recent court decisions have expressed reluctance in granting this right. Schools are given wide latitude to educate students as they see fit and are given the presumption of having nearly much of an interest in educating children as parents have in educating and upbringing these children. Meanwhile, recent court decisions appear to merely pay lip service to parents' rights to rear their children. Specifically, the right to opt out of a portion of an educational program has largely been ignored as a fundamental constitutional right deserving of the highest protection. There does appear to be a chance, however, that a court could recognize a fundamental constitutional right in opting out when the parental rights claim is combined with a constitutional right such as the free exercise of religion. The Rutherford Institute, of course, will continue to litigate parental rights issues in this arena in an effort to reverse the recent dangerous trend undercutting parental rights in public education.

The Rutherford Institute hopes that this information has been helpful to you. If you desire additional information on this or other issues of religious liberty, or if you need personal legal assistance in any area regarding religious freedom or parental rights, then please feel free to write us at The Rutherford Institute, P.O. Box 7482, Charlottesville, VA 22906, or call (434) 978-3888, or email us at tristaff@rutherford.org.

Endnotes

1. 262 U.S. 290 (1923).

2. *Id.* at 399.

3. *Pierce v. Soc. of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

4. *Smith v. Org. of Foster Families For Equality and Reform*, 431 U.S. 816, 842 (1977).

5. *Paul v. Davis*, 424 U.S. 693 (1976).

6. *Id.* at 713. In *Hawaii Psychiatric Soc., District Branch of America Psychiatric Assoc. v. Ariyoshi*, 481 F.Supp. 1028 (D. Hawaii 1979), a federal district court determined that it would be enough to infringe upon these Azone of privacy@ rights which have been determined to include marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* at 1038.

7. 455 U.S. 745 (1982). *See also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (state may not intrude in this protected area).

8. 505 U.S. 833 (1992)

9. 406 U.S. 205 (1972).

10. *Id.* at 215.

11. *Id.*

12. *Moody v. Cronin*, 484 F.Supp. 270 (D.C. Ill. 1979); *Grove v. Mead School District No. 354*, 753 F.2d 1528, 1533 (9th Cir.) (1985); *Spense v. Bailey*, 465 F.2d 797, (6th Cir. 1972).

13. 81 Colo. 276, 255 P. 610, 613-614 (1927).

14. *Hardwick v. Board of School Trustees of Fruitridge School Dist., Sacramento Cty.*, 205 P. 49, 54 Cal.App. 696 (1921).

15. *Id.* at 54.

16. 385 F.Supp. 395 (D.N.H. 1974).

17. *Id.* at 397.

18. *Id.*

19. *Id.* at 401.

20. *Id.*

21. 68 F.3d 525 (1st Cir. 1995).

22. *Id.* at 533.

23. *Id.* at 533.

24. *Id.* at 534.

25. Other courts had preceded *Brown* in rejecting objections to sex education courses. *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir. 1970) (per curiam); *Hopkins v. Hamden Bd. of Educ.*, 289 A.2d 914 (Conn. 1971).

26. 899 F.Supp. 1443 (M.D.N.C. 1995), *aff'd*, 89 F.3d 174 (4th Cir. 1996).

27. *Id.* at 1455.

28. *Id.* at 1450.

29. Id. at 1453.

30. 873 F.Supp. 846 (S.D.N.Y. 1995), *aff'd*, 73 F.3d 454 (1996).

31. *Id.*

32. *Id.*

33. 550 N.E.2d 420, 74 NY2d 114 (N.Y. 1989).

34. *Id.* at 430.

35. *Id.* at 422.

36. *Id.*

37. *Id.*

38. *Id.* at 430.

39. 195 A.D.2d 46, 606 NYS2d 259 (1993), *leave to appeal dismissed by* 637 NE2d 279, 83 NY2d 906 (1994).

40. 195 A.D. at 56.

41. *Id.* at 55-56.

42. *Id.*

43. *Id.* at 59.

44. *Id.* at 59.

45. 420 Mass. 749, 652 N.E.2d 580 (1995).

46. 420 Mass. at 757.

47. *Id.*

48. *Id.* Criticizing the *Alfonso* decision, the *Falmouth* court reasoned that the outcome of *Alfonso* was wrongly decided on the basis of a New York state law requiring parental consent for any form of medical treatment. In actuality, the portion of the *Alfonso* lawsuit focusing on parental rights was determined purely on an analysis of constitutional parental rights, and not any New York state law.

49. *Id.* at 758.

50. *Id.*

51. 148 F.3d 260 (3rd Cir. 1998).

52. *Id.*

53. *Littlefield v. Forney Ind. School Dist.*, 268 F.3d 275 (5th Cir. 2001).

54. *Id.*